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In The
Supreme Court Of The United States

October Term, 195

No. 193

MITCHELL S. MILLIKEN and DOROTHY MILLIKEN,
Petitioners,

v.

EDWIN GILL, Director of Internal Revenue for the District of North Carolina, and the United States of America,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Ellsworth D. Thomas
Wachovia Bank Building
Winston-Salem, North Carolina
Attorney for Petitioners

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the

United States Court of Appeals for the Fourth Circuit, entered in the above entitled cause April 5, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It appears, however, at No. 72,494 P.H. Court Decisions. The opinion of the District Court for the Middle District of North Carolina is not officially reported, but appears on pages 7 and 8 of the appendix attached to this petition.

JURISDICTION

The jurisdiction of the Supreme Court to review this case rests upon 28 U.S.C. No. 1254(1).

Jurisdiction of the court of first instance was based on Section 934 of the Revised Statutes of the United States, 28 U.S.C.A. Sec. 747, 28 U.S.C.A. Sec. 2410(a), and upon the general power of the District Court to grant equitable relief.

QUESTIONS PRESENTED

I

Petitioners had filed a suit to restrain the respondents from proceeding to seize and sell their personal property levied upon to collect a jeopardy assessment of income taxes. The complaint alleged that the action of the respondents was arbitrary, oppressive and illegal and that petitioners would suffer irreparable loss and injury if the injunction were not granted.

Was the Court of first instance prohibited from granting the injunction because of 26 U.S.C. 1946 ed Section 3653? The Courts below said that this case came within the prohibition of said Act.

II

Was the action by the respondents arbitrary, oppressive and illegal, and did special and extraordinary facts and circumstances exist warranting relief? The Courts below held that special and extraordinary facts and circumstances did not exist which would take this case out of the prohibition contained in said Act.

STATUTES INVOLVED

28 U.S.C. 1254

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. June 25, 1948, C. 646, 62 Stat. 928.

28 U.S.C. 2463

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. June 25, 1948, C. 646, 62 Stat. 974.

28 U.S.C. Sec. 2410. Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the district court for the Territory of Alaska, or in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. June 25, 1948, C. 646, No. 1, 62 Stat. 972.

Internal Revenue Code—Section 3653

(a) Tax. Except as provided in Sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) Liability of Transferee or Fiduciary. No suit shall be maintained in any Court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any income, war profits, excess profits, or estate tax, (2) the amount of the liability, at law or in equity, of a transferee of property of a donor in respect of any gift tax, or (3) the amount of liability of a fiduciary under Section 3467 of the Revised Statutes in respect of any such tax. (26 U.S.C. 1946 ed., Sec. 3653)

STATEMENT OF THE FACTS

This case arises from a judgment of the Circuit Court of Appeals of the Fourth Circuit affirming an order of the

District Court for the Western District of North Carolina which dissolved a temporary restraining order which it had previously issued, refused to grant a preliminary injunction, and dissolved petitioners' action for injunctive relief against respondents. The district court held that there were no such special and extraordinary facts and circumstances as to take the instant case out of the prohibition contained in 26 U.S.C. 3653.

On June 11, 1952, a jeopardy assessment on account of a claimed deficiency in income tax was made against petitioners, amounting, with penalties and interest, to the sum of $82,625.00, (R. 1), and on June 16, 1952, the jeopardy assessment was levied on all of the property of the petitioners (R. 2). On August 4, 1952, the deficiency, with penalties and interest, was determined to be $105,216.55. (R. 3). Petitioners, on October 27, 1952, filed petitions for review of all of the assessments with the Tax Court of the United States, where the petitions are still pending. (R. 2).

Prior to the time of the jeopardy assessment, sometime on or about July 8, 1950, petitioners had formed a corporation which purchased a grill in Rockingham, North Carolina, but on July 18, 1950 creditors of the former owner instituted receivership proceedings and took over operation of the business. Subsequent thereto, there has been protracted litigation as to ownership of the grill, and petitioners have been informed that they could never succeed in recovering it, as they would be broken financially by claims for back income taxes. Shortly after these threats were made, representatives of the Director of Internal Revenue began an investigation of petitioners' income tax returns. (R. 28, 29)

Just before the jeopardy assessment on June 16, 1952, petitioner Mitchell S. Milliken, in order to determine

whether the receiver in the grill case would relay the information to the respondents, advised him that he could raise $25,000.00 to pay off the receivership, being careful that no one overheard this conversation. Petitioners' attorney, after the jeopardy assessment, when he talked to the Revenue Department in Greensboro, was told that if petitioners could pay about $25,000.00 that something could be worked out as to lifting the jeopardy assessment, and that the Department believed that he could make this payment. (R. 29, 30)

Following the levy of the jeopardy assessment, respondents operated all of the machines of petitioners until September 26, 1952, at which time they were returned to petitioners. Respondents collected approximately $3,300.00 from the machines during the time they operated them. (R. 19, 20) The machines were returned to petitioners after they had filed an application for discharge of most of their personal property on or about September 15, 1952. (R. 11) Petitioners were advised by respondents that the application should be processed within two or three weeks, but the discharge was not actually approved until January 6, 1953. The Commercial State Bank of Hamlet, North Carolina had agreed to loan petitioners $30,000.00 to pay for said partial discharge, but, because of the long delay in approving the application, the bank could not make the loan as the State of North Carolina had filed certificates of liability in the office of the Clerk of the Court of Richmond County on November 19, 1952 perfecting liens upon the property. (R. 13)

Petitioners' tax returns were prepared by accountants, and the records that petitioners kept were complete and accurate. (R. 30) The respondent Gill contends in his affidavit that the records were not available to his agents,

(R. 21) but petitioners say that said records were at all times available to the agents at the office of petitioners. (R. 30)

The respondents used a net worth basis for determination of deficiencies, and used as a beginning net worth as of December 31, 1944 the sum of $5,263.71. (R. 31) Petitioners state that the beginning net worth was completely unrealistic and inaccurate, as at that date they had approximately $40,000.00 of undisclosed cash, and, in support thereof, petitioners have submitted affidavits by Mr. Drumheller, cashier of the Charlotte Branch of the Federal Reserve Bank, that he remembered a transaction wherein he exchanged at least $30,000.00 in bills of small denominations for bills of larger denominations, and an affidavit by Mr. Cherry, as Vice President, that this was prior to May 31, 1945, as after that date the bank was required to make records of transactions of this nature, and the bank records do not show such a transaction. (R. 30, 31, 41)

The respondents were advised of the inaccuracy of their net worth computations during January, 1953, and at that time were informed of letters from the cashier and the Vice President of the bank substantiating these statements. (R. 31) They were also advised by the certified public accountant employed by petitioners that he had prepared a tentative net worth statement which indicated that the additional tax, after making all proper adjustments, could not at the very most exceed $15,000.00. (R. 12, 41) The respondents had seized $3,974.26 in bank and building and loan accounts in the name of petitioners, and had also padlocked in safety deposit boxes Government Bonds in the amount of approximately $10,964.00, which belonged to petitioners. (R. 11) Nevertheless, respondents, on April 1, 1953, reseized the three cars and proceeded to advertise for sale the cars, launderette equipment, spare parts and other

items. In addition thereto, agents of respondents had also contacted various persons with reference to attending a sale of the phonograph machines and other property of the Millikens', and had stated to various persons that they were going to sell all of said machines and personal property. (R. 4, 15) This has never been denied by respondents.

The net worth of petitioners, based on the reasonable market value at the time of the assessment, was approximately $90,852.00 whereas the total amount of taxes, penalties and interest now claimed is in the amount of $116,775.94. (R. 13, 26) A forced sale will net only a small portion of the reasonable value of the property and only a small amount of the amount of claimed deficiencies. (R. 15)

Petitioners have no money with which to pay the taxes and sue for a refund. They have made every attempt to procure a bond, but have been unable to do so. The only relief which it appeared they could have was a partial discharge, which was rendered unsuccessful by the slowness, carelessness and negligence of the respondents in having said discharge approved. Petitioners do not have an adequate remedy at law, as the losses resulting from the forced sale of their property and the destruction of their business would be irreparable. (R. 5, 16)

REASONS FOR GRANTING THE WRIT

I

The decision below is in conflict with the following decisions of this Honorable Court:

1. *Miller* v. *Standard Nut Margerine Company*, 284 U.S. 498, 509, 510, 511, 52 S. Ct. 260, 76 L. ed. 422, 430

2. *Hill* v. *Wallace*, 259 U.S. 44, 62, 66 L. ed. 822, 827, 42 S. Ct. 453.

3. *Allen* v. *Regents of the University System of Georgia*, 304 U.S. 439, 82 L. ed. 1448

The primary question to be answered in the instant case is whether the injunction proceeding instituted by petitioners is barred by Section 3653 of the Internal Revenue Code. The district court held that it came within the prohibition of that Section and dissolved the temporary restraining order, and dismissed the complaint. The Court of Appeals for the Fourth Circuit, in affirming, stated:

> "The case before us has none of the 'extraordinary and exceptional circumstances' necessary to take it outside the prohibition of the statute, but is an ordinary case of a jeopardy assessment against taxpayers who have failed to properly return their income for taxation, where the Commissioner believes that the collection of the deficiency will be jeopardized by delay. Neither the fact that appellants claim that they do not owe the tax, nor that it has been illegally and improperly assessed against them is any ground for granting the injunction, nor is the fact that the collection of the tax will result in hardship, nor that they failed to secure the loan to make the $30,000.00 payment as a result of delay on the part of government officials".

Does Section 3653 of the Internal Revenue Code act as a complete bar to the present suit as held by the lower Courts? We say an emphatic and positive "No". Then what effect does that Section have?

As an aid in understanding the statute, it will be help-

ful to determine what the law was prior to the enactment of that provision (Act of March 2, 1867, 14 Stat. at L. 475, Chap. 169), which became Rev. Stat. 3224, U.S.C. Title 26, No. 154, and subsequently Sec. 3563 of the Internal Revenue Code, U.S.C. Title 26, No. 3563. Prior to its enactment, this Honorable Court had held repeatedly that a suit would not lie to restrain a tax upon the sole ground of its illegality, but, where complainant showed in addition to illegality special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the Collector. *Dows* v. *Chicago,* 11 Wall. 108, 20 L. ed. 65; *Hannewinkle* v. *Georgetown,* 15 Wall. 547, 21 L. ed. 231; *State R. Tax Cases,* 92 U.S. 575, 614, 23 L. ed. 669, 673.

Does Sec. 3653, formerly Sec. 3224, alter that salutory rule? This Court, in holding in *Miller* v. *Nut Margerine Co.* that it did not, very aptly stated the effect of said statute in these words:

> "Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests .... The Section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This Court has given effect to Sec. 3224 in a number of cases. . . . It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable." (Citing *Hill* v. *Wallace,* 259 U.S. 44, 62, 66 L. ed. 822, 827, 42 S. Ct. 453, supra, and other cases).

Now let us apply these principles to the present case. Was the tax asserted herein by respondents illegal, and was their action arbitrary and capricious within the rule laid down in the above cases? The answer is a clear and resounding yes.

We sincerely believe that even the action of the respondents in making the jeopardy assessment, which, from the evidence in the record, was completely unnecessary and was unjustified except by the bare assertion of the respondent director that he deemed it necessary, falls within those categories. But certainly the subsequent action of the respondents in proceeding to reseize and sell the personal property of petitioners prior to a final adjudication in The Tax Court and after a discharge of same had been prevented by the slow and negligent manner of respondents' agents in approving the discharge, and after respondents had been advised by a certified public accountant that he had gone over all the records of petitioners and had prepared a tentative net worth statement which showed that petitioners could not have understated their income in an amount in excess of $60,000.00, assuming no cash, and had been advised that petitioners had approximately $40,000.00 in cash, which last statement was substantiated by letters from the teller and Vice President of the Charlotte Branch of the Federal Reserve Bank, which were shown respondents, and were further advised that therefore the maximum additional tax, penalties and interest could not exceed the amount respondents had in their possession either in cash or bonds under seal, constituted arbitrary and capricious action and made the tax asserted illegal. As a matter of fact, if we have read the opinions of the lower courts correctly, we believe they indicate agreement with this conclusion.

We also agree with the statement of the lower court that these acts alone are not sufficient to justify equitable relief.

We disagree with the conclusion that this case "has none of the 'extraordinary and exceptional circumstances' necessary to take it outside the prohibition of the statute."

The stumbling block to a proper understanding of the facts and circumstances involved in this case has been the erroneous belief that the only issue involved here relates to the three automobiles, launderette equipment and repair parts of a value of approximately $6,000.00. This completely disregards the allegations of the complaint and the statements contained in the affidavits in support thereof that respondents were about to seize and sell all of petitioners' machines and personal property, which would wipe out their business—*and these statements are uncontradicted.* As a matter of fact, the temporary restraining order prohibited respondents from seizing and selling other personal property of petitioners, which was in accordance with the prayer for relief contained in the complaint.

Is this relief justified? The uncontradicted facts support only one conclusion—a clear and resounding yes. Mitchell S. Milliken, in his affidavit of April 30, 1953, states that "said sale will produce only a small portion of the total amount claimed by the defendants, and that this affiant believes that after the defendants have conducted said sale that they will thereupon seize the coin-operated phonograph machines and all other personal property of this affiant and his wife; that this affiant has been advised by various persons that the defendants' agents have contacted them with reference to attending a sale of the phonograph machines and other property of this affiant and bidding on said property, and have stated to various persons that they intend to sell all of the property of this affiant and his wife, including his business of coin-operated phonograph machines". This is not denied by respondents—at no place in the record is there a statement to the effect that respondents will not

proceed to seize and sell all of the coin-operated phonograph and other machines and all other personal property of petitioners if injunctive relief is not granted. In fact, the record conclusively shows the contrary—that unless equitable relief is given, respondents intend to dispose of all of petitioners' business and personal property, and had, in fact, already taken steps to do so when the temporary restraining order was granted.

It is a well established principle of equity that one need not wait until the threatened injury has been consumated before being granted injunctive relief. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 80 L. ed. 1160; *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L. ed. 1117, 43 S. Ct. 658; *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510, 69 L. ed. 1070, 45 S. Ct. 571. This Court in *Carter* v. *Carter Coal Co., supra*, reasserted the following language used by it in the cases of *Pennsylvania* v. *West Virginia*:

> "One does not have to wait the consumation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough".

and in *Pierce* v. *Society of Sisters of Holy Names, supra*, where it said:

> "The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity".

Let us paraphrase—here, respondents have seized part of petitioners' property and posted same for sale, and have contacted other persons with reference to attending a sale

of all of the phonograph machines and all the other personal property of petitioners and have stated that they are going to seize and sell same. This will result in the complete destruction of petitioners' business, with irreparable loss. The injury here is present and real, and irreparable—prevention thereof is a well recognized function of a court of equity.

The facts in the instant case are not distinguishable from *Miller* v. *Nut Margerine Co.*, 284 U.S. 498, 509, 510, 511, supra. When this Honorable Court in that case said:

> "it requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and afflict loss for which it would have no remedy. It is clear that by reason of special and extraordinary facts and circumstances, Section 3224 does not apply"

it could well have been talking about the present case.

The statutory notices of proposed deficiencies which were issued and mailed to the Milliken's show the total amount of taxes, penalties and interest claimed to be in the amount of $116,775.94. The reasonable market value net worth of the Milliken's is approximately $90,852.00. The defendants have seized all of their bank and building and loan accounts and they have no money with which to pay the taxes and sue for a refund. The seizure and sale of their properties would inflict a loss which would ruin them financially. The sale of all of their assets would only net a small proportion of the total amount claimed and would result in the complete and total destruction of their business and the confiscation of their life's savings.

They have been unable to give bond and then litigate.

In fact, what limited opportunity they had to obtain a partial release was lost by the slow, negligent and careless action of the defendants in approving the application for discharge. Petitioners have no adequate remedy at law.

II

The decision below is also in conflict with the following decisions:

Fourth Circuit: *Shelton* v. *Gill*, 202F. 2d 503

Sixth Circuit: *Midwest Haulers* v. *Brady*, 128 F. 2d 496; *John M. Hirst & Co.* v. *Gentsch*, 133 F. 2d 247

Ninth Circuit: *Slaven* v. *United States*, Cent. Div. Cal., not reported, P.H. 72, 227 (1953)

Tenth Circuit: *Driscoll* v. *Jones*, 19 F. Supp. 792 (N.D. Okla.)

The Fourth Circuit, in attempting to distinguish the present case from *Shelton* v. *Gill*, 202 F. 2d 503, stated:

> "In that case a jeopardy assessment had been levied on property of a person and a corporation as transferees; but they were held by the Court not to be transferees at all within the meaning of the statute but purchasers for value of the property who were in no way liable for the obligations of the persons against whom the tax had been assessed.
>
> The Court held that this fact, together with the fact that the losses which would result from the interference with business and the forced sale of property were irreparable and no adequate remedy at law existed, brought the case within the 'extraordinary and special

> circumstances' rule. That case manifestly has no application to appellants . . . The case before us has none of the 'extraordinary and exceptional circumstances' necessary to take it outside the prohibition of the statute."

Now, let us analyze the two cases and determine whether the distinction is valid. Does the mere fact that *Shelton* v. *Gill*, 202 F. (2d) 503, supra, involves a suit by a transferee for injunctive relief justify the distinction? The answer is clearly no. Subsection (a) of Section 3653 of the Internal Revenue Code provides that:

> "no suit for the purpose of restraining the assessment or collection of *any* tax shall be maintained in *any* Court" (Italics ours)

and Subsection B provides that:

> "no suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of taxpayer in respect of any income, war profit, excess profits or estate tax".

The taxes involved in *Shelton* v. *Gill* were income taxes, and the plaintiffs were transferees—thus, by the express terms of Section 3653, such a suit was also prohibited unless they came within the exception to the rule.

This was aptly stated in *Mazella* v. *Yoke*, 70 F. Supp. 462, as follows:

> "it is urged by defendant that the cases relied upon by plaintiffs are not in point here, because they involve taxes of a different nature. I do not agree with this contention. It is immaterial what kind of tax is in

question. The principal of equitable relief in exceptional and extraordinary circumstances remains the same. If such circumstances exist, the remedy is given; otherwise it is denied by the statute".

If the fact that plaintiffs were transferees does not warrant the distinction, is it warranted solely because the Director in the Shelton case, by his motion to dismiss, admitted that petitioners were transferees and had received nothing from the transferor for which they had not paid full value? At first blush, this might seem to be a valid basis, but let us reflect for a moment. That would mean that "special and extraordinary circumstances" sufficient to justify equitable relief could never exist if the Director states that pursuant to investigation he believes that additional taxes are due as claimed. We do not believe this to be the law.

This is clearly expressed by the Ninth Circuit in *Mitsukiyo Yoshimura* v. *Alsop,* CA 9, 1948, 167 F. 2d 104, when the Court stated:

> "It is obvious that if relief cannot be granted without showing that the tax assessment on the coerced statement is not owing and the Court in which the injunction is sought cannot 'compute what the tax is or what it should be' there never can be an injunction issued in cases of such fraud and abuse of powers by the agents of the Internal Revenue Bureau".

If here the Court cannot grant an injunction unless it is admitted there is no tax due and owing and a statement by the Director that pursuant to investigation by his agents, he believes that additional taxes are due as claimed, forecloses the Court from considering whether additional taxes

are due or not, then as a practical proposition, there will never be an opportunity to grant injunctive relief and the doctrine of *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, supra, will have been obliterated. We cannot conceive that this result will be permitted.

In further amplification of this point, it is desired to point out that it is conceded by the record that the Government's opening net worth on December 31, 1944 was only $5,263.71, whereas, the record shows petitioners had approximately $40,000.00 in undisclosed cash, in addition to their other assets. This is substantiated by the testimony of Mr. Drumheller, teller at the Charlotte Branch of the Federal Reserve Bank, and by Mr. Cherry, Vice-President of the bank.

The danger of accepting general statements of a Director as true beyond contradiction is shown by the following: The Director in his affidavit claimed he was not advised by any accountant or lawyer that petitioners' tax liability could not exceed $15,000.00. In an answering affidavit, Bruce Gebhardt, an attorney representing the Milliken's in the tax case, stated in an affidavit that he advised Mr. James Turner, Intelligence Division, Greensboro, N. C., that the accountant had made a thorough check and had indicated that there could not be an understatement in excess of $60,000.00, assuming no cash—that Mr. Turner was further advised of the approximately $40,000.00 in cash, which was supported by the signed statement of Mr. Drumheller and Mr. Cherry. Therefore the additional tax with penalties and interest could not exceed $15,000.00. This stands uncontradicted by Mr. Turner.

If *Shelton* v. *Gill* cannot be distinguished by either of the two points discussed above, then the only other basis for the distinction is the fact that petitioners in the instant case

would not suffer an irreparable loss. In support of the refusal to grant injunctive relief, the Court lays stress on the fact that the property to be sold did not exceed in value $6,000.00. If this were all the property that was involved, then we would concede that there was not irreparable damage, as contemplated by the statute. But such is not the true situation—not only were the respondents proposing to sell the $6,000.00 worth of property, but they were proposing to seize and sell all of petitioners' machines and personal property—in effect, to destroy completely their business, ruin them financially, and inflict loss for which they would have no remedy at law. As previously pointed out, equity does not require that petitioners wait until the loss has been made complete before granting relief. Nor does it permit respondents to seize and sell petitioners' property piecemeal, thus doing, indirectly, what they couldn't do directly.

The decision of the lower court is also in conflict with the decisions of the Sixth Circuit. That circuit in *Midwest Haulers* v. *Brady,* 128 F. 2d 496, after tracing the genesis of Section 3653 and the development of the principles underlying the exceptions to the section, reversed the district court's order dismissing the complaint. The Circuit Court there held that where the complaint alleged facts which if true show that the taxes sought to be collected are probably not due and that the sale of the property distrained would completely destroy the business of plaintiffs, which loss will be irreparable, then the case comes within the exception to Section 3653. The present case, wherein the complaint and affidavits in support thereof show that no additional tax is due, at least in excess of what the respondents have already obtained either in cash or bonds under seal, and that a seizure and sale of all of the machines and personal property of petitioners, which respondents are about to

make, will result in the total destruction of their business and complete financial ruin, is at all fours with *Midwest Haulers* v. *Brady*, 128 F. 2d 496, supra.

The decision denying injunctive relief is directly in conflict with the decision of the Sixth Circuit in the above cited case and also with its decision in *John M. Hirst and Co.* v. *Gentsch*, 133 F. 2d 247.

In this later decision the Sixth Circuit after stating at page 248 that "the circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued" held that, where the taxes sought to be collected are probably not validly assessed and the collection of them would ruin taxpayer and the relief under Internal Revenue law is inadequate, then a case is presented for equitable relief. This case is also in direct conflict with the decision in the instant case.

The same conflict exists as to the cases of *Driscoll* v. *Jones*, 19 F. Supp. 792 (N.D. Okla.) and *Slaven* v. *United States* (Cent. Div. Cal.)—not reported, P.H. 72, 227 (1953). What we have previously said applies with equal force to these cases—we believe no further elaboration will be beneficial.

III

The case involves a question of public importance which should be settled. It involves a conflict between summary actions by agents of the government to collect taxes and the right of the individual to have his day in court before being deprived of his property.

It is conceded that if adequate opportunity is afforded the individual for the protection of his legal rights under the revenue laws then the prohibition of section 3653 prevents

relief. However, if the legal remedy is not adequate and the damage would be irreparable then courts of equity should intervene.

The history of the Court of Star Chamber in England may well be recalled to point out the dangers of autocratic action. Originally created to deal with those individuals who were too powerful for the ordinary courts and given the power of prerogative justice without being bound by the safeguards of the common law, it eventually became the instrument of tyranny. The arbitrary powers given government agents for the collection of revenue, if not limited by the safeguards of equity, can and have become the instruments of tyranny. Such should not be permitted.

The one major factor that has enabled the United States to achieve its greatness has been the diligent protection of the rights of its citizens. A fundamental concept of that protection is the proposition that its citizens are entitled to their day in court before being deprived of their life, liberty or property.

The actions sought to be restrained here would deprive the Milliken's of their property before they are given the opportunity of their day in Court. This is an extreme weapon and should be handled with the greatest of care and caution. However, it has not been so treated in the instant case.

It is therefore the time for equity to once again stand between the individual and the arbitrary and capricious actions of the officials of the Government who have acted in disregard of the facts and have exceeded the bounds of the law.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

KENNETH D. THOMAS
Suite 218, White Building
Hickory, North Carolina
Attorney for Petitioners

June 30, 1954

APPENDIX

MITCHELL S. MILLIKEN and DOROTHY MILLIKEN v. EDWIN GILL, Director
(U. S. Court of Appeals, Fourth Circuit,
No. 6748, April 5, 1954)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Kenneth D. Thomas for Appellants, and Frederick G. Rita, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General, Ellis N. Slack, Special Assistant to the Attorney General, and Bryce R. Holt, U. S. Attorney, on brief) for Appellees.

PARKER, Chief Judge:

This is an appeal by Mitchell S. Milliken and his wife, Dorothy Milliken, from an order dissolving a temporary restraining order and dismissing a suit instituted to enjoin the sale of certain personal property levied upon to collect a jeopardy assessment of federal income taxes. The court held that the suit was one to restrain the collection of internal revenue taxes within the prohibition of 26 U.S.C. 3653 and that there were no such special circumstances as would bring it within the doctrine laid down by this court in *Shelton* v. *Gill, Collector,* 4 Cir. 202 F. 2d 503. We think that this was correct.

The facts as shown by the pleadings and affidavits filed with the District Court are that on June 11, 1952, a

jeopardy assessment on account of a deficiency in income taxes was made against appellants amounting with penalties and interest to the sum of $82,625.00 and on June 16, 1952 the assessment was levied on property of the appellants. On August 4, 1952 the deficiency with penalties and interest was determined to be $105,216.55, and appellants on October 27, 1952 filed petitions for review of these assessments with the Tax Court of the United States, where the petitions are still pending.

Following the levy upon the property of appellants the Director of Internal Revenue permitted them to continue the operation of coin operated music and amusement machines, cigarette machines and penny scales from which the chief portion of their income was derived. For a period of about three months, agents of the Director, holding keys to the machines, collected therefrom a sum in excess of $3,300.00 which was applied on tax liability. Since September 26, 1952, appellants have been allowed to operate the business with a view of keeping it a going concern pending the final determination of tax liability in the Tax Court. The Director offered to accept from appellants bond in the sum of $60,000.00 for the release of personal property from the lien of the attachment pending action by the Tax Court, but appellants were unable to give this bond. On September 27, he agreed that he would submit to the Commissioner a proposal of appellants to pay $30,000 for release of a part of the property and did submit the proposal which was accepted in January, 1953, but appellants were unable to comply, because in the meantime the State of North Carolina had perfected liens upon the property which rendered it impossible to secure a loan which had been promised them by a bank in connection with the proposal submitted.

On April 1, 1953, the Director seized under the levy of

the jeopardy assessment certain used music and amusement coin operated machines, which were not in operation, having an estimated value of $1,700.00, and three automobiles, having an estimated value of $4,200.00, one or more of which belonged to Mrs. Milliken. The machines in operation and two trucks used in operating them were not seized. The Director was proceeding with the sale of the property seized when he was stopped by the restraining order issued herein. In dissolving the restraining order and dismissing the suit the judge below quotes the affidavit of the Director that the total value of the property proposed to be sold will not exceed $6,000.00, whereas the joint liability of appellants for the single year 1950, where no transferee liability is involved, exceeds $12,000, of which only $1,259.97 has been collected.

There are contentions on the part of appellants that they do not owe the tax or certainly so large an amount as has been assessed against them, and that the proceedings against them have been inspired by their enemies, and on the part of the Director that they owe the tax and have refused to cooperate with the tax agents in determining the correct amount of their liability. We need not go into these contentions, however, as we think that without regard to what the facts there may be, the action of the trial judge was correct.

It is expressly provided by statute that, with certain exceptions not here relevant "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". 26 USC 3653(a). There is the same prohibition on suit with respect to restraining the assessment or collection of "the liability, at law or in equity, of a transferee of property of a taxpayer". 26 USC 3653(b). Subsection (a) of this section of the Internal Revenue Code is derived from R. S. 3224, the underlying

philosophy of which is set forth in *State Railroad Tax Cases,* 92 U.S. 575, 613 (2 AFTR 2367), where the Supreme Court said:

> "The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.
>
> "That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice".

The same philosophy has been applied with respect to suits to restrain the assessment or collection of transferee

liability. In *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (9 AFTR 1467), the Supreme Court, in holding that, because of the statutory provision, no such suits could be maintained, said:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham* v. *United States*, 92 U.S. 85 (2 AFTR 2365) 88-89; *Springer* v. *United States*, 102 U.S. 586, 594 (2 AFTR 2410); *Hagare* v. *Reclamation District No. 108*, 111 U.S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States* v. *Woo Jan.*, 245 U.S. 552; *Ng Fung Ho* v. *White*, 259 U.S. 276, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue. *Snyder* v. *Jarks*, 109 U.S. 189; *Dodge* v. *Osborn*, 240 U.S. 118 (3 AFTR 2396), *Graham* v. *du Pont*, 262 U.S. 234 (3 AFTR 3195). This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928, c. 852, sec. 604, 45 Stat. 791, 873."

As pointed out by the Supreme Court in a note to the

opinion in the last cited case (283 U.S. p. 596 note 6) there is no substantial relaxation of this principle in the provision that, while an appeal is pending before the Tax Court, no proceeding by distraint may be taken, and, notwithstanding 26 USC 3653, such proceeding may be enjoined. "For even in such case, if the Commissioner believes the assessment or collection of the tax will be endangered by delay, he may make an immediate jeopardy assessment and collect by distraint unless the taxpayer files a bond. *** The paramount right of the United States to require immediate payment, or surety therefor, is not diminished". The procedure followed in the case before us was that here pointed out as proper.

See also *White Packing Co.* v. *Robertson,* 4 Cir. 89 F. 2d 775 (19 AFTR 594); *Harvey* v. *Early,* 4 Cir. 160 F. 2d 836 (35 AFTR 1054); *Herwig* v. *Crenshaw,* 4 Cir. 188 F. 2d 572; *Burke* v. *Mingori,* 10 Cir. 128 F. 2d 996.

Injunction may be granted, notwithstanding the statutory provisions, in a case apparently within its terms, "in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable". *Hill* v. *Wallace,* 259 U.S. 44 (3 AFTR 3160). Thus, in the case cited, injunctive relief was granted restraining the collection of an unconstitutional Grain Future Trading Tax, since it would be impractical for brokers to pay the tax thereby imposed on each separate sale of grain and then bring suit to recover the payment. In *Miller* v. *Standard Nut Margarine Co. of Florida,* 284 U.S. 498 (10 AFTR 795), 510-511, an injunction was upheld to restrain the collection of the oleomargarine tax on the sale of a product to which it did not apply, the court saying:

> "This is not a case in which the injunction is sought upon the mere ground of illegality because of error in

the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying sec. 3224 apply, if at all, with little force. *LeRoy* v. *East Saginaw Ry. Co.*, 18 Mich. 233, 238-239. *Kissinger* v. *Bean*, Fed. Cas. 7853. Respondent commenced business after the product it proposed to make had repeatedly been determined by the Commissioner and adjudged in courts not to be oleomargarine or taxable under the Act, and upon the assurance from the Bureau that its product would not be taxed. For more than a year and a half respondent sold its product relying upon the aforesaid rulings that it was not subject to tax. If required to pay the tax its loss would be seven cents per pound. Before the Commissioner's latest ruling respondent had made and sold so much that the tax would have amounted to more than it could pay. Petitioner acquiesced in the injunctions granted in Rhode Island and the District of Columbia and did not assess any tax upon identical products contemporaneously being made by complainants in such suits, and directed enforcement against respondent's entire products. Such discrimination conflicts with the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, sec. 3224 does not apply.

In *Yoke* v. *Mazello*, 4 Cir. 202 F. 2d 508, 509-510, this

court sustained an injunction in a case where a jeopardy assessment had been levied and the Collector refused to accept a bond with personal sureties owning unincumbered real estate worth in excess of double the amount of the assessment, and refused to accept anything but a corporate bond. The Court held this an abuse of discretion which brought the case within the class of extraordinary and exceptional circumstances. The court speaking through Judge Soper said in that case:

> "The terms of the statute taken literally would control the decision, but it has been construed by the courts to admit of exceptions other than those specified, and injunctions to stay the collection of taxes have been granted under special and extraordinary circumstances which were deemed sufficient to bring the case 'within some acknowledged head of equity jurisprudence'. *Miller* v. *Standard Nut Margarine Co. of Fla.*, 284 U.S. 498 (10 AFTR 795), 52 S. Ct. 260 (10 AFTR 795), 263, 76 L. Ed. 422. This course has been followed in situations of dire necessity where it was believed that the assessment was clearly unlawful, or was levied against the wrong person, and the enforcement of the tax would inflict an irreparable loss upon the complaint; and in some instances an injunction has been granted under circumstances not unlike those described in the complaint in the pending case".

Shelton v. *Gill*, 4 Cir. 202 F. 2d 503, particularly relied on by appellant, is another case where "extraordinary and entirely exceptional circumstances" justified the granting of an injunction. In that case a jeopardy assessment had been levied on property of a person and a corporation as transferees; but they were held by the court not to be transferees at all within the meaning of the statute but

purchasers for value of the property who were in no way liable for the obligations of the persons against whom the taxes had been assessed. The court held that this fact, together with the fact that the losses which would result from the interference with business and the forced sale of the property were irreparable and no adequate remedy at law existed, brought the case within the "extraordinary and special circumstances" rule. That case manifestly has no application to either of appellants. If it be argued that property of Mrs. Milliken is being levied on for taxes due by her husband, the answer is that the value of all the property,which is about to be sold is only about half of the tax for the year 1950, as to which no transferee liability is involved and which has been assessed against her as well as against her husband.

The case before us has none of the "extraordinary and exceptional circumstances" necessary to take it outside the prohibition of the statute, but is an ordinary case of a jeopardy assessment against taxpayers who have failed to properly return their income for taxation, where the Commissioner believes that the collection of the deficiency will be jeopardized by delay. Neither the fact that appellants claim that they do not owe the tax, nor that it has been illegally and improperly assessed against them is any ground for granting the injunction, nor is the fact that the collection of the tax will result in hardship, nor that they failed to secure the loan to make the $30,000 payment as a result of delay on the part of government officials. The collection of the revenues of the government would be greatly interfered with if injunctions were to issue on any such grounds; and it was the clear purpose of 26 USC 3653 to prevent this from happening.

For the reasons stated, the order of dismissal will be affirmed.

Affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil No. 745-G

Mitchell S. Milliken and Dorothy Milliken,
Plaintiffs,

vs.

Edwin Gill, Director of Internal Revenue for the District of North Carolina, and the United States of America,
Defendants.

ORDER

After considering the pleadings and numerous affidavits filed herein by the parties, and oral argument of counsel at the hearings held by the Court subsequent to the granting of the temporary restraining order issued on the 10th day of April, 1953, the Court is of the opinion that said restraining order should be dissolved and this action dismissed, as it is an action to restrain the collection of internal revenue taxes, the maintenance of which is expressly prohibited by Section 3653 of the Internal Revenue Code.

In reaching this conclusion this Court is not unmindful

of the recent opinion in the case of *Shelton* v. *Gill, Collector of Internal Revenue,* et al. (Fourth Cir.) 202 F. 2d 503, but this Court is of the opinion that there was no such showing made in this case as to bring it within the ruling of the *Shelton* case, when considered in the light of the facts set forth in the opinion of our Circuit Court in that case. To point to only one such distinguishing feature in these cases, Judge Soper, writing for the Court in the *Shelton* case, said: "The Government confronts the difficulty that the plaintiffs, by the admitted facts, are not transferees of the taxpayer within the meaning of the statute." Here there is no such admission. Indeed, Director Gill in his affidavit filed herein states that "the total value of all the property proposed to be sold will probably not exceed $6,-000.00, whereas the joint liability of the plaintiffs, where no transferee liability is involved, for the single year 1950 exceeds $12,000.00, of which only $1,259.97 has been collected.

Further, this Court is of the opinion that the plaintiffs have shown no equitable grounds for relief prayed for; that this case falls squarely within the prohibition of the aforesaid Section 3653 of the Internal Revenue Code and should be dismissed.

WHEREFORE, the temporary restraining order as set forth above is dissolved, and this action is dismissed.

July 23, 1953

/s/ JOHNSON J. HAYES
United States District Judge

Plaintiffs except. allowed
/s/ HAYES, *Judge*

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 193

MITCHELL S. MILLIKEN AND DOROTHY MILLIKEN, PETITIONERS

v.

EDWIN GILL, DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NORTH CAROLINA, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 23-32) is reported in 211 F. 2d 869. The opinion of the District Court (Pet. 32-33) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1954. The petition for certiorari

was filed on July 6, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over the United States in a suit to enjoin the collection of internal revenue taxes.

2. Whether the complaint alleges, in addition to the illegality of the assessment of the taxes complained of, exceptional and extraordinary circumstances sufficient to except it from the prohibition against suits to enjoin the collection of federal taxes provided by Section 3653(a) (b) of the Internal Revenue Code.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

* * * *

[26 U.S.C. 273.]

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as here-

inafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * *

[26 U.S.C. 311.]

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) *Liability of Transferee or Fiduciary.*—No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property

of a taxpayer in respect of any income, war-profits, excess-profits, or estate tax, (2) the amount of the liability, at law or in equity, of a transferee of property of a donor in respect of any gift tax, or (3) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C., Title 31, § 192) in respect of any such tax.

[26 U.S.C. 3653.]

STATEMENT

The complaint (T. App. 19-24) [1] alleges in substance as follows:

On June 11, 1952, without notice to petitioners, there was assessed against the petitioners a jeopardy assessment of income taxes, penalties and interest in the amount of $82,624, and liens were filed against the petitioners for this amount. The Government seized all of the property of the petitioners and the Director has received from banks, building and loan associations and coin-operated machines of the petitioners between $7,000 and $8,000. Ten thousand dollars in Government bonds belonging to the petitioners are in a safety deposit box sealed by the Director.

On August 4, 1952, the deficiency in the petitioners' taxes was redetermined to be $105,216.55. On October 27, 1952, the petitioners filed petitions for the review of these determinations in the Tax Court of the United States.

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[1] The record for purposes of the petition consists of the appendix to the taxpayer's brief below (T. App.) and the appendix to the government's brief below (G. App.).

Individuals who desire to wreck the business of the petitioners have made statements to the Director and his agents with respect to the petitioners' earnings and net worth which are wholly inaccurate and which have influenced the Director and his agents in making the assessments complained of.

On April 1, 1953, the Government seized certain automobiles belonging to the petitioners and threatened to sell all their personal property. If the property is sold, it will realize only a small portion of the amount of tax assessed against the petitioners and they will suffer great loss.

The liability assessed against the petitioner Dorothy Milliken is based upon transferee liability and she is not a transferee. The amounts assessed against the petitioners in their opinion are excessive, unreasonable and far greater than the amount actually due and the petitioners have no adequate remedy at law.

Upon these allegations the petitioners prayed for an injunction against the sale of the seized property or the seizure of additional property.

A motion to dismiss on behalf of the United States was filed upon the ground that the District Court was without jurisdiction over the United States because the United States has never consented to be sued in a suit to enjoin the collection of taxes (G. App. 13).

A motion to dismiss on behalf of the Director was filed upon the ground that the District Court was without jurisdiction because the suit is one to enjoin the collection of federal taxes the mainte-

nance of which is expressly prohibited by Section 3653 of the Internal Revenue Code (G. App. 14).

The District Court sustained the motions to dismiss (Pet. 32-33). The Court of Appeals affirmed upon the ground that although the complaint alleged that the tax was illegally and improperly assessed, there did not exist extraordinary and exceptional circumstances sufficient to bring the case within the rule of *Miller* v. *Nut Margarine Co.*, 284 U. S. 498 (Pet. 23-32).

ARGUMENT

It is elementary that the sovereign can be sued only upon its consent clearly and unequivocally given by statute. *United States* v. *Sherwood*, 312 U. S. 584. There is no statute by which the United States has consented to be sued *eo nomine* in a suit to enjoin the collection of taxes and none is pointed to by the petitioners. The decision as to the dismissal of the action with respect to the United States is correct and it is not in conflict with any decision of any of the Courts of Appeals or of this Court.

Section 3653(a) of the Internal Revenue Code, *supra*, which is the reenactment of Section 3224 of the Revised Statutes, provides, with exceptions not here material, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". By Section 3653(b) of the Internal Revenue Code, *supra*, the prohibition was extended to assessments of transferee liability under Section 311(a) of the Internal

Revenue Code, *supra*. The validity of transferee assessments and their immunity from injunctive process was upheld in *Phillips* v. *Commissioner*, 283 U. S. 589, 595-596.

Exception to the prohibition against restraints on the collection of taxes has been permitted only in those rare cases where, in addition to the indisputable illegality of the tax, the plaintiff shows exceptional and extraordinary circumstances sufficient to bring the case under some recognized head of equity jurisdiction. *Miller* v. *Nut Margarine Co.*, 284 U. S. 498. The Court of Appeals properly held that in this case the petitioners failed to allege these essential elements. There is no charge that no tax could have been legally assessed nor that there are any unusual circumstances of the kind which courts have recognized as lifting the bar against injunctions.

The petitioners contend that the decisions of the Court of Appeals is inconsistent with rulings of this Court in *Miller* v. *Nut Margarine Co., supra; Hill* v. *Wallace*, 259 U. S. 44; *Allen* v. *Regents*, 304 U. S. 439. In all of these cases a legal tax could not possibly have been assessed against the plaintiffs and, in addition, the Court noted the existence of exceptional and extraordinary circumstances sufficient to bring the case under some head of equity jurisdiction. In *Miller* v. *Nut Margarine*, the taxpayer had been misled by prior rulings into the belief that his product was not taxable so that he set his price at a figure which would result in a loss on each sale, if the tax were held applicable, thus destroying the business and ruining the tax-

payer financially. In *Hill* v. *Wallace,* payment of a tax on each of many sales transactions would lead to a multiplicity of suits for return, while failure to pay the tax would result in heavy penalties. In *Allen* v. *Regents,* this Court held that the possibility of an inadmissible burden upon a state governmental activity constituted extraordinary circumstances justifying a resort to equity. The present case has none of the elements on which this Court relied in the cases cited.

Petitioners also contend that this case is in conflict with *Shelton* v. *Gill,* 202 F. 2d 503 (C. A. 4th); *Midwest Haulers* v. *Brady,* 128 F. 2d 496 (C. A. 6th); *John M. Hirst & Co.* v. *Gentsch,* 133 F. 2d 247 (C. A. 6th). The Court of Appeals distinguished this case from *Shelton* v. *Gill, supra,* pointing out that in that case there could by no legal possibility have been a valid transferee assessment against the plaintiff and that the complaint alleged extraordinary and exceptional circumstances in that the losses from interference with his business and the forced sale of his property would be irreparable. The Court of Appeals further pointed out that in this case the property of the purported transferee, Dorothy Milliken, is being levied upon not only under transferee assessments but also upon a joint assessment against her and her husband for income taxes for 1950 for which year the petitioners filed a joint return. The value of the property seized by the Director is only about one-half of the amount of the assessment for that year (T. App. 43).

In *Midwest Haulers* v. *Brady, supra,* the Court

of Appeals for the Sixth Circuit held that under the allegations of the complaint a valid assessment of social security taxes could not be made against the plaintiff because it was not an employer. The court further held that there existed exceptional and extraordinary circumstances, in the nature of cessation of the taxpayer's business and forfeiture of its common carrier certificate, sufficient to bring the case within the rule of the *Nut Margarine* case. The *John M. Hirst & Co.* v. *Gentsch* case, *supra*, is very similar to the *Midwest Haulers* case and was ruled by the same considerations.

CONCLUSION

The decision of the Court of Appeals was correct and there is no inconsistency between it and the decisions of this Court nor any conflict with the holdings of any Court of Appeals. The petition for certiorari should therefore be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

AUGUST, 1954.

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